IN THE

Supreme Court of the United States

No. 217

STATE OF OHIO, EX REL. RODNEY P. LIEN, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, IN CHARGE OF THE LIQUIDATION OF THE OHIO SAVINGS BANK AND TRUST COMPANY,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION

FRANK EWING,
1 Madison Ave.,
New York City, New York,

CLAUDE R. BANKER,
E. DONALD DEMUTH,
8th Floor Security Bank Bldg.,
Toledo, Ohio,
Attorneys for Respondent.

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OPINIONS BELOW

The District Court rendered an opinion (R. 252) and this opinion is reported in 36 F. Supp. 457. The District Court also made findings of fact (R. 272) and entered conclusions of law (R. 278) and dismissed the petition of the petitioner (R. 280). The Circuit Court of Appeals affirmed the judgment of the District Court without opinion and stated in its order that the judgment of the District Court was affirmed in accordance with the findings of fact, con-

clusions of law, and opinion of the District Court (R. 295) (127 F. 2d 297).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1942 (R. 295). Thereafter on April 10, 1942, the petitioner filed an application for rehearing (R. 297). That petition for rehearing was denied on April 14, 1942 (R. 303). The petition for writ of *certiorari* was filed July 9, 1942. The jurisdiction of this court is invoked under Title 28, U. S. C. A., Sec. 347.

QUESTION PRESENTED

Can an agent who makes voluntary advancements to its principal for the benefit of a third person and for his own benefit, and without the knowledge of the principal, recover the voluntary advancements from the principal upon the termination of the agreement?

Questions Nos. 1, 2, 3 and 4 set forth in petitioner's petition are not the real questions presented for the reason that the facts as shown by the record and the concurrent findings of facts of the lower courts are not correctly stated by petitioner.

CORRECTIONS OF PETITIONER'S SUMMARY STATEMENT OF THE CASE

Petitioner, on page 2 of his statement of the case, states that the advances were made at the request of Metropolitan and for its benefit and convenience and represented remittances by the Bank in advance of collections of sums due on the mortgages. This statement is not supported by the evidence in the record. The evidence is that the payments made by the Bank on mortgages which had not been

collected by the Bank were voluntarily made by the Bank and were made without the knowledge of Metropolitan.

Petitioner, on page 3 of the statement of facts, sets forth a letter dated January 21, 1926 (R. 93), being a letter from the Bank to Metropolitan. Petitioner neglects to quote the first three paragraphs of said letter, which are as follows:

> "We have your letter of January 15 inquiring as to the number of loans, the amount due thereon as of December 31, 1925, etc.
>
> "According to our records as of December 31, 1925, we have 74 loans totalling $247,057.00. This amount, you will note, does not correspond with your records for the reason that in several cases, we have advanced payment from this office, in order to keep your records current *where we have felt justified in so doing because of the honesty and integrity of the mortgagor and because of reasons beyond our control.*
>
> "In this connection, we wish some arrangement could be made as to the crediting of these amounts, in that, if we send the payment to you without having received it here, we credit this amount upon the note and it might be rather embarrassing for us in collecting this amount if the mortgagor knew that there had been a credit applied on his note."

Petitioner, on page 7 of the statement of the case, quotes partially from a letter dated September 2, 1926 (R. 227), written by Metropolitan to the Bank. He states with reference to this letter that said letter was apparently overlooked by the District Court during its consideration of the case and similarly overlooked by the Circuit Court of Appeals. However, this letter is referred to three distinct times in the brief filed in the Circuit Court of Appeals and was the main point stressed by petitioner in his argument before the Court of Appeals so that it was, therefore, impossible for the Court of Appeals to overlook this letter. The petitioner states that thereafter the Bank, in accord-

ance with positive instructions in this letter, made its remittances to correspond with the billings of Metropolitan. The evidence in this record shows that the payments were not made upon positive instructions of Metropolitan but were voluntarily made by the Bank.

In a letter dated July 1, 1926, written by Metropolitan to the Bank (R. 98):

> "*If occasionally you desire* to allow a borrower a little time, we prefer that you advance the payment to us when due. This method will simplify matters greatly for us here."

And a letter written by Metropolitan to the Bank dated July 14, 1926 (R. 100):

> "The other suggestion is that you make weekly remittances to us, that is you could send your offering Friday or Saturday so that we would receive it Monday, mailing a statement covering all remittances *due and collected* during that week."

Also a letter of May 12, 1931, written by the Bank to Metropolitan (R. 114, 115):

> "Many of our borrowers, though possessing excellent paying records have, on occasions, found it necessary to ask that their principal installment be deferred. We have in the past, chosen not to bother you with requests for waivers, but the accumulation of these advances over a period of five or more years, has now reached the total of something over $150,000.00. It does not now appear that we can expect our people to make up these deferred installments of principal, and consequently our only method of reimbursing ourselves is through an arrangement with you whereby several future installments of principal may be waived and thus permit our balances to become equalized."

Petitioner, on page 9 of the statement of the case, refers to a letter written by Mr. R. J. Slawson, Manager of the Auditing Department of the Bank, dated December 8,

1930, addressed to Claude Campbell, who was then Vice-President of the Bank. There is nothing in the record which shows that Metropolitan ever saw a copy of this letter or that it had any knowledge of its contents. This letter was objected to by respondent at the trial of this case and the objection was sustained (R. 271). This letter, never having been brought to the attention of Metropolitan, cannot be binding upon it in any way. It was a letter addressed from one officer of the Bank to another and there is nothing in the record to show that Metropolitan had any knowledge of this letter.

Petitioner in his statement of the case on page 10 states:

> "Obviously, they must have taken with them the letter written by Slawson to Campbell for their information and assistance."

There is no evidence in the record that this letter was taken by Mr. Campbell to Columbus, Ohio, at the time he consulted with Mr. Gray. The evidence shows that Mr. Campbell negotiated the contract with Metropolitan in 1920 and supervised the handling of Metropolitan's collection account continuously up to December 9, 1930, and all the facts and statements contained in this letter were entirely familiar to Mr. Campbell and there is no reason for the deduction that this letter was taken by Mr. Campbell for his conference with Mr. Gray.

Petitioner in his statement of the case, on page 13, with reference to the endorsement of payments upon the notes, says:

> "Obviously Metropolitan uses the expressions, 'endorsement' or 'credit' on the 'mortgage papers' or 'notes' in the sense that the remittances are not to be regarded as payments or credits against the mortgage obligations in the absence of specific instructions or advice from the Bank."

The evidence in this record shows conclusively that Metropolitan never endorsed payments received by it on any mortgage obligations or on mortgage notes and it, therefore, agreed not to endorse the payments received from the Bank on the mortgage notes and that this is all it ever agreed to do. The evidence conclusively shows that all payments were credited to the mortgage notes on the mortgage loan cards and it was but continuing the practice which had long been in force in its Accounting Department.

On page 13 of the statement of the case petitioner states that Metropolitan at no time made any request for a detailed statement of the advances made by the Bank and consequently the Bank never furnished Metropolitan up to that date such a detailed statement. This is not supported by the evidence in this record.

A letter dated May 14, 1931, written by Metropolitan addressed to the Bank (R. 116) is in part as follows:

> "Before I discuss this matter with Mr. Norton in Mr. Fackner's absence, I am going to ask that you please send me a list of such advances not by loan numbers but by months. I mean by that that I want a list separated between the quarterly and the regular semi-annual type over the last year, giving us the total amount due at each maturity, the total amount paid, and the amount of your advances."

No detailed list of advances, as requested, was ever furnished by the Bank to Metropolitan.

ARGUMENT

Petitioner does not assert any conflict among the Circuit Courts of Appeals. The case of *Coffey vs. Lawman*, 99 F. 2d 245, supports the decision below.

The petitioner claims in his reasons relied on for allowance of writ that the decisions below conflict with applicable local law. However, the petitioner utterly fails

to point out in his brief how the decisions below in any respect conflict with applicable local law.

The petitioner in his statement and brief makes a very elaborate review of the evidence, attempting to show that Metropolitan instructed the Bank to make the advancements and that the Bank was obligated to make the advancements. This same argument was made by the petitioner in the lower courts. Both courts below found against the petitioner on this issue and this court will accept the concurrent findings of both courts below as establishing the facts found.

United States of America vs. James E. O'Donnell et al., 303 U. S. 501;
General Talking Pictures Corporation vs. Western Electric Co., 304 U. S. 175.

The petitioner inferentially admits in his brief that the law was properly applied by the courts below to the facts found by these courts but claims that the courts below erred in their findings of fact. This court will accept the concurrent findings of the courts below as establishing the facts that the advances by the Bank were not made upon the instructions of Metropolitan to the Bank, but were made by the Bank to Metropolitan as payments upon the mortgage obligations and that if the Bank chose, for reasons pertinent to itself, to volunteer payments to Metropolitan when due but uncollected, then it was making such remittances not for the benefit of Metropolitan but for its own benefit as well as for the benefit of the mortgage obligors (R. 276, 277).

However, the concurrent findings of fact of the lower courts are amply supported by the evidence in the record.

The principal argument set forth by the petitioner is that the payments made by the Bank were made because the

Bank was obligated to make said advancements. The trial court, however, found (R. 276):

> "That the advances by the Bank were not made upon the instructions of Metropolitan to the Bank, but were made by the Bank to Metropolitan as payments upon the mortgage obligations."

In the letter dated July 1, 1926, written by Metropolitan to the Bank (R. 98):

> "If occasionally *you desire* to allow a borrower a little time, we prefer that you advance the payment to us when due. This method will simplify matters greatly for us here."

This quotation shows that Metropolitan did not request or instruct the Bank to make any advancements but merely stated that if the Bank desired to give the borrower a little more time that it preferred the Bank to advance the funds. It was not a suggestion or an invitation that the Bank advance all payments but only in the event that the Bank desired to give an honest borrower a little more time.

Also the quotation in a letter written by Metropolitan to the Bank dated July 14, 1926 (R. 100):

> "The other suggestion is that you make weekly remittances to us, that is you could send your offering Friday or Saturday so that we would receive it Monday, mailing a statement covering all remittances *due and collected during that week.*"

If Metropolitan was instructing the Bank to make this advancement why would Metropolitan ask it to send all remittances due and collected during the previous week? Also, why would it state that if the Bank desired to allow the borrower a little time to advance the payment on the borrower's behalf?

Also the letter dated May 12, 1931, written by the Bank to Metropolitan (R. 114):

> "Many of our borrowers, though possessing excellent paying records have, on occasions found it necessary to ask that their principal installments be deferred. We have in the past, chosen not to bother you with requests for waivers, but the accumulation of these advances over a period of five or more years, has now reached a total of something over $150,000.00. It does not now appear that we can expect our people to make up these deferred installments of principal, and consequently *our only method of reimbursing ourselves* is through an arrangement with you whereby several future installments of principal may be waived and thus permit our balances to become equalized."

If the Bank did not consider these advancements as payments on the mortgage obligations why would it attempt to reimburse itself from the borrower and state that it was the only method of its obtaining reimbursement? All it would have to do if they were not considered as payments on the mortgage notes would be to demand from Metropolitan the amounts which it had advanced. This conclusively shows that both parties to the agreement considered the advancements as actual payments upon the mortgage obligations.

The foregoing quotations fully and completely support the finding of fact No. 17 of the District Court (R. 276).

Petitioner in his brief states that Metropolitan agreed that the advancements would not be treated as actual payments by the principal except upon written advice by the agent that they had been collected from the mortgagors.

The District Court (R. 276) in finding of fact No. 18 found as follows:

> "18. That the reason that impelled the Bank to request Metropolitan not to credit upon the mortgage notes any advances made by the Bank was that the Bank did not desire to become embarrassed by

> having the mortgagor know that his note in the hands of Metropolitan had received a credit for a payment by the Bank in his behalf and further the Bank did not desire to be compromised or embarrassed in any way if it chose to repurchase the mortgage and begin foreclosure proceedings."

All Metropolitan agreed to do was to not endorse the payments upon the mortgage notes.

The letter written by Metropolitan to the Bank on July 30, 1926 (R. 101) contained the following:

> "We hereby confirm the understanding that remittances received from you are not to be endorsed on the notes except upon your written advice."

And in the letter of December 22, 1930, written by Metropolitan to the Bank (R. 114):

> "Referring to your letter of December 17th, 1930, this is to advise you are entirely correct in your understanding that we do not credit on the mortgage papers remittances made by your Bank covering items due in connection with the mortgage loans you have sold to us. This has been our practice in the past and will continue to be so, as such remittances *are not endorsed on the notes* except upon your written advice."

These are the only two letters written by Metropolitan to the Bank with reference to the endorsements of the payments on the written instruments and are entirely contrary to the statement made by petitioner that it would not treat the payments as actual payments and bears out the contention of Metropolitan that it only agreed not to endorse the payments upon the notes.

The foregoing portions of the stipulation amply and fully support the findings of fact made by the lower courts.

The Bank never attempted to recover from Metropolitan any payments which it had made on behalf of the mortgagors. There is no evidence in the record that the Bank

ever made a demand on Metropolitan for any of the payments which it had made on behalf of the mortgagors during the period from August 24, 1920, to August 15, 1931. The Superintendent of Banks never made any demand on Metropolitan that it pay to him any of the amounts which the Bank paid to Metropolitan on behalf of the mortgagors until this suit was filed on August 15, 1935, exactly four years after the closing of the Bank.

The Superintendent offset amounts on deposit to the credit of mortgagors against payments made by the Bank to Metropolitan on behalf of said mortgagors. By so doing, the Superintendent took the position that the relationship of debtor and creditor existed between the Bank, on account of these advances, and the mortgagors, and that he was entitled to apply any amount found in the Bank to the credit of any of the mortgagors toward the payment of the amount advanced by the Bank on behalf of said mortgagors (R. 275) (Finding of Fact No. 12).

The principle of *ultra vires* in this case is unimportant for the reason that the transactions between the parties are closed and it is impossible to return to the *status quo*. The contract is not *ultra vires* and the act of the Bank in advancing the money under the circumstances in this case is not *ultra vires*.

Coffey vs. Lawman, 99 F. (2d) 245.

Section 710-47 of the General Code of the State of Ohio, which was in force at the time these transactions took place, provided with reference to the enumerated powers of banks in part as follows:

> "To do all needful acts, to carry into effect the objects for which it was created."

Where an act is done which is not prohibited by the charter of the bank and is done for the bank's benefit the contract is not *ultra vires*.

C. J. S. Banks and Banking, in Volume 9, page 343, paragraph 160, states:

> "A contract of a bank is legal if it has a natural and reasonable tendency to aid in the accomplishment of the objects for which the bank was created."

The lower courts found:

> "3. That the object of the bank in entering into the kind of a contract which obtained between it and Metropolitan was to aid in the accomplishment of one of the objects for which the Bank was created.
>
> "4. That the agreement between the Bank and the defendant was not an *ultra vires* contract.
>
> "5. That the action of the Bank in its dealings and transactions with Metropolitan was not against public policy, was not in violation of any statute and was not an *ultra vires* act, illegal and beyond the power of the Bank to entertain." (R. 278 and 279.)

The fact that the Bank had the privilege of repurchasing from Metropolitan any mortgage in default, and could bring suit upon the mortgage as soon as repurchased by it and proceed with the collection of the mortgage for the full amount due from the mortgagor which would include the amount paid by the Bank to Metropolitan for the repurchase of the mortgage and any advancements made by the Bank on behalf of the mortgagor shows beyond any doubt the correctness of the foregoing findings. The repurchased mortgage in the hands of the Bank constituted a secured loan for any sums so advanced.

The principle that an executed contract cannot be disaffirmed on the ground that it is *ultra vires* has been followed by the courts of Ohio.

State, ex rel. Fulton, Supt. of Banks, vs. Dean, 47 Ohio App. 558.

The Superintendent of Banks was not deceived or misled with reference to this transaction but was fully in-

formed with reference to the entire transaction, and, therefore, stands in no better position than the Bank. All of the authorities are to the effect that a State Superintendent of Banks in the absence of fraud or deceit has no greater rights than the Bank itself. If the Superintendent stands in no better position than the Bank the Superintendent cannot recover the payments made by the Bank to Metropolitan on behalf of the mortgagors, as under no circumstances could the Bank itself recover said payments.

CONCLUSION

There are concurrent findings of both lower courts. There is no conflict of decisions. The decisions below do not conflict with any applicable local law. The decision below is correct. The petition should be denied.

Respectfully submitted,

FRANK EWING,
CLAUDE R. BANKER,
E. DONALD DEMUTH,
Attorneys for Respondent.

August 13, 1942.